Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

RANDALL S. GOULDING, *pro se*,

Petitioner,

vs.

THE UNITED STATES,

Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals
For the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

RANDALL S. GOULDING, *pro se*
Petitioner
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10 pp

(1a) QUESTIONS PRESENTED

1. Was defendant's § 2255 petition properly denied without evidentiary hearing, where he averred *(inter alia)* (I) that he desired to testify, and that his decision not to testify was based on counsel's representations that he would make certain arguments (i.e., good faith) to the jury which in fact were not made; and (II) that there was newly discovered evidence substantiating his claim of invidious prosecution (that criminal investigation, "sting" and prosecution directly resulted from his Civil Rights Act suit against IRS special agents)?

2. Was defendant's waiver of his constitutional right to testify effective when secured by trial

counsel's admitted insistence that defendant not testify:

a. for reasons never disclosed to the defendant,

b. which reasons the Assistant U.S. Attorney admitted formed an improper basis for a trial counsel to prevent the defendant from testifying, and

c. when defendant's agreement with his attorney not to testify was premised upon the attorney's unfulfilled promise to explain to the jury that defendant's *modus operandi* was not to defraud the government, but served to protect his purported client's (the under-cover agent's) confidential and privileged communications regarding

said client's past crime?

3. If such assistance of counsel was ineffective, was defendant's purported waiver of his constitutional right to testify nonetheless validated by judicial inquiry of defendant as to the circumstances of his waiver of his constitutional right to testify, when the purported waiver was made without defendant's knowledge that trial counsel would not make the argument to the jury that counsel had promised the defendant he would make?

4. Was the sec. 2255 petition properly dismissed without hearing as to the claim of invidious prosecution on grounds the matter already was decided on direct appeal, where petitioner averred newly discovered evidence not previously considered by any court?

(1b) PARTIES INVOLVED (per Rule 21.1(b)]

Petitioner, Randall S. Goulding, was Defendant in District Court and Appellant in the United States Court of Appeals for the Seventh Circuit.

Respondent, The United States, was the Plaintiff in the District Court and appellee in the Court of Appeals.

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I. Where the Petition under 28 U.S.C. § 2255 alleged Goulding was convicted in violation of his constitutional rights to effective

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IN THE
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THE UNITED STATES,

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Petition for Writ of Certiorari to the United States Court of Appeals For the Seventh Circuit

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Randall Goulding, *pro se* (hereafter, defendant, or Goulding), prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, affirming the judgment of the United States District Court for the Northern District of Illinois, Eastern

Division, denying his petition under § 2255 without evidentiary hearing.

Judgment and Opinion Below

The Order of the United States Court of Appeals for the Seventh Circuit, affirming the judgment of the District Court, denying the § 2255 petition, is set out as App. A. (App. 1) The Order is not reported.

Jurisdictional Statement

On August 2, 1996, the U.S. Court of Appeals for the Seventh Circuit filed its Decision (App. A; App. 1) affirming the judgment of the District Court. (Apps. C & D; App. 19, 20; not reported) Petition for rehearing was denied on August 19, 1996. (App. B; App. 17) This Petition for Certiorari is timely filed within 90 days thereafter.

Jurisdiction is invoked under 28 U.S.C. § 1254(1) and Rules 10(a) & (c), 12.1, and 13.1 of this Court.

Constitutional Provisions

The 5th Amendment to the U.S. Constitution provides in pertinent part:

> "No person shall . . . be deprived of life, liberty or property, without due process of law . . . ."

The 6th Amendment to the U.S. Constitution provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; . . . and to have the Assistance of Counsel for his defence."

Statute Involved

28 U.S.C. § 2255

STATEMENT OF THE CASE

Petitioner, Randall S. Goulding (hereafter, defendant, or Goulding), an

attorney, was charged in an 18-count indictment with conspiracy to defraud the United States, mail fraud, and illegal transportation of currency and monetary instruments, in violation of 18 U.S.C. §§ 371 and 1341 and 31 U.S.C. §§ 5316(a) and 5322(a). Found guilty by a jury, he was sentenced to 6 months on Count 1 and 5 years probation on Counts 2 through 18, ordered to make restitution of $8,000 to the United States, and to perform 500 hours of community service. On direct appeal, the 7th Circuit affirmed and denied rehearing and suggestion for rehearing en banc. United States v. Goulding, No. 92-3616, 26 F.3d 656 (7 Cir. 1994),[1]

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[1] Also charged and convicted at a joint trial, and similarly sentenced, was attorney Michael M. Ushijima, whose

cert. denied, No. 94-6110.

After affirmance on direct appeal, defendant filed an amended § 2255 petition (R. 251),[2] the government filed its Response (R. 255), and defendant filed a Reply (including his unpresented testimony). (SR 34-36)

The District Court denied the Petition without evidentiary hearing. (R. 259, 260; App. C & D; App. 19, 20) The 7th Circuit affirmed (App. A, App.

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case was affirmed on direct appeal, No. 92-3630, in the same Opinion, 26 F.3d 656 (7 Cir. 1994). He is not a party to this collateral proceeding.

[2] "R." refers to items in the Record on Appeal, and "S.R." to items in the Supplemental Record (material from the underlying trial, and record in the direct appeal). The Amended Petition, R. 251, is referred to as the Petition. The original petition (R. 204), filed while the direct appeal was pending, was dismissed as premature. (R. 216)

1) and denied rehearing and suggestion for rehearing en banc. (App. B, App. 17)

The basis for federal jurisdiction in the court of first instance is 28 U.S.C. § 2255. The Court of Appeals had jurisdiction under 28 U.S.C. § 1291.

Statement of Facts The affirming opinion on direct appeal contains the underlying facts re defendant's pre-trial motions, 26 F.3d at 661-62, and the evidence presented at trial, id. at 658-60, not repeated here. The substance of the testimony Goulding would have given, had he testified, is summarized in his District Court Reply. (SR 34-36) Additional facts as needed are set out in the Argument below.

The Petition in essence averred:

Due to ineffective assistance of

his trial counsel, Goulding was denied his right to testify - in context, his only hope of a successful defense. (pars. 74-96, R. 251, pp. 27-32) Counsel had promised the jury, in opening statement, that they would hear from Goulding, respecting his good faith and entrapment, and that they would be instructed on such defenses. (S.R. 180, pp. 120-36) None of this came to pass.

Although Goulding waived the right to testify (S.R. 181, pp. 888-89, in G. Resp. R. 255, par. 20, pp. 9-10; S.R. 181, p. 782), he claimed the purported waiver is constitutionally invalid, due to pressure from his attorney, and his attorney's admitted lack of preparation. Goulding's trial counsel, Patrick Tuite, claimed post-trial that he decided not

to have Goulding testify because he did not believe Goulding would testify truthfully. (R. 255, Grp. Ex. 1 [Letters from Atty. Tuite to AUSA Podliska dated July 14, 1993 and September 21, 1994])[3] Counsel's alternative bases for not having Goulding testify - lack of time to prepare him to testify; assessment that Goulding would not make a credible witness - were asserted by the District Court as reason for finding that counsel's decision not to put Goulding on the stand was not unconstitutionally ineffective assistance. (R. 259, pp. 3-

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[3] These letters are not under oath, although Tuite states therein that he will restate their contents under oath. But even if they were under oath, a District Court may not decide contested factual issues in a § 2255 proceeding via choosing between conflicting affidavits. See authorities, pp. 21 & 28, infra.

4; App. D, App. 27-28)

The District Court, while making oblique reference to "other reasons," expressly declined to address same.[4]

In Tuite's letters to AUSA Podliska, Tuite stated, "**I believe** he would not have testified truthfully," (Letter dated 9/21/94, in Ex. A to R. 255; Emphasis added), and "**I believed** he would have perjured himself if he testified . . . **it was my decision** to keep him off the stand." (Letter dated 7/14/93, in Ex. A to R. 255; Emphasis

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[4] "Although his counsel ascribes other reasons . . ." (App. 26; R. 259, p. 3) The Court did not reach such other reasons, accepting Goulding's representation that Tuite said he did not have time to prepare him to testify. (App. 26) The Court further expressly found that Tuite's decision not to put Goulding on the stand because Goulding would not have been a good witness, was reasonable. (App. 27-28)

added.) Tuite does not mention any hard-evidence basis for his personal belief.[5] At most, he referred to "inconsistent statements" Goulding had made to him by way of explanation of some of Goulding's statements on the tapes, as a reason for not believing Goulding. (Letter dated 7/14/93, in Ex. A to R. 255) Tuite never confronted Goulding with his concerns and beliefs.

Uncontradicted Affidavits attached to the Petition, R. 251, of Ronald

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[5] Contrary to the state of mind of the lawyer in such decisions as Nix v. Whiteside, 475 U.S. 157 (1986), where the client had made express admissions to counsel which rendered his proposed testimony perjurious, here, Tuite does not claim that any such admissions were made to him, or that he had any hard evidence for disbelieving Goulding. Indeed, it would be difficult to imagine how Goulding could have lied, or how Tuite could have known definitively that he would. The evidence was on tape.

Goulding, defendant's brother (Ex. N), Victor Goulding, defendant's father (Ex. O), Attorney/CPA Leonard Gerstein (Ex. K), and Sheldon Drobny, defendant's friend, a CPA and tax expert (Ex. L), establish the long-standing intention of Tuite and defendant, as known to and discussed with the affiants, that defendant would testify, and that it was never contemplated that defendant would not testify. More specifically, Drobny avers that he conferred with Goulding and Tuite on at least eight (8) occasions before trial, and the most frequent subject of discussion was always Goulding's prospective testimony and how to approach various subjects. (Ex. L, pars. 11-12) The said affidavits of Ronald Goulding (Ex. N,

par. 12) and Victor Goulding (Ex. O, par. 5) further establish that in repeated discussions each had with Tuite, Tuite never suggested that he believed defendant would lie.

Additional Ineffective Assistance of Counsel. In the Petition (R. 251), pars. 46-73, defendant asserts, *inter alia*, that counsel was further unconstitutionally ineffective for failure to request instructions on good faith and reliance on advice of counsel; failure to ascertain whether there were signs at the airport stating the reporting requirement; failure to investigate various specific leads and expert witnesses[6] suggested by

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[6] Essentially, the expert witnesses whom counsel did not contact, were various attorneys and tax experts

defendant; failure to request entrapment instructions; failure to object to factual misstatements in government's closing argument.

Newly discovered evidence substantiated Goulding's claims of

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who would have testified that Goulding's conduct, for which he was being charged with defrauding the government, was proper conduct by an attorney endeavoring to preserve his ethical duty of confidentiality to his client. Moreover, Tuite failed to present testimony from several specifically identified lawyers and/or tax experts to that effect, who so averred in Affidavits attached to the Petition. See Aff. of Leonard Gerstein (Ex. K); Aff. of Sheldon Drobny (Ex. L). Moreover, the Affidavit of Attorney Fred Harbecke, who represented Goulding in his Civil Rights Act suit against Dietz and Feinglass, establishes that Harbecke was aware of the agents' alleged improprieties; that he met with Goulding and Tuite in March, 1992 respecting Harbecke's prospective testimony for Goulding and how Harbecke could assist Tuite in preparing Goulding to testify; yet Tuite never thereafter contacted Harbecke. (Ex. M)

selective prosecution, vindictive prosecution, and outrageous government conduct; demonstrating that the prosecution against him was instituted in retaliation for his having filed a Civil Rights Act suit against IRS special agents Feinglass and Dietz.[7] (R. 251, pars. 9-43, pp. 3-15; attached Exs. A through G.)

These documents demonstrate that the criminal investigation referral reports withheld by the government from defendant in this case, are routinely turned over to subjects (see R. 251, par. 27, p. 8); that in the opinion of

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[7] See Goulding v. Feinglass, 811 F.2d 1099 (7 Cir. 1987), *cert. denied*, No. 86-1826, 482 U.S. 929, 96 L.Ed.2d 701 (1987). The unsuccessful petition for certiorari details the conduct of Feinglass and Dietz re Goulding.

former IRS Special Agent Howard Emirhanian (Ex. A-1), adopted by Ret. Asst. Commissioner of the IRS, Anthony Langone [who apparently approved continuation of the undercover sting operation beyond the initial, December 18, 1986 meeting (between Goulding and Evegelatos)] (see Exs. A & B), the government would not have conducted an undercover operation due solely to the broad allegations of informant Evegelatos (Ex. A-1, p. 2); and that - contrary to the evidence adduced in the pre-trial hearings - there now is evidence - previously withheld by the government[8] - that Agent Feinglass offered a client of Goulding the

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[8] This material surfaced in an unrelated case, after Goulding's trial. (See R. 251, par. 31, pp. 9-10.)

opportunity to make a cash settlement with the IRS, but only if he discharged Goulding as his attorney.[9] The Petition alleged that this was concealed during discovery re Goulding's pre-trial motions alleging government misconduct and vindictive prosecution, and asserted how this evidence, if timely made available, would have both supported the Motion and buttressed the defense. (R. 251, pars. 33-34, pp. 10-11)

Further substantiating defendant's

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[9] This includes: sworn Declaration of IRS Special Trial Attorney Robert M. Ratchford (Ex. A attached to Ex. G to the Pet., R. 251), referring to Report of Investigation by Regional Inspector--Midwest Region, containing an interview with Revenue Agent Feinglass by Inspectors Peter McCauley and John Corcoran on January 18, 1985 in Chicago, Illinois; the Memorandum of Interview, which contains the relevant statements, is contained within the Petition, R. 251, at p. 15 of Ex. I.

position[10] is [Group] Ex. J, wherein two former clients of Goulding confirm surreptitious contacts by Feinglass, and remarks by Feinglass disparaging Goulding, while they were represented by Goulding in a docketed U.S. Tax Court case. (See R. 251, par. 37, p. 12.)

And in the same referenced tax court case, there is now documentation

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[10] In its direct appeal affirming Opinion, the 7th Circuit said no ill will or vindictiveness was attributed to the prosecutors who actually made the decision to prosecute Goulding, and that there was no evidence that Agents Dietz and Feinglass had any influence on the bringing of the prosecution. 26 F.3d at 662. Had the information now attached via Exhibits to the Petition been available, we submit, a different conclusion could reasonably be reached. Moreover, the new evidence would have warranted allowing the defense to develop the issues of bias and prejudice of the government witnesses before the jury. At trial, cross-examination of the agents as to possible bias was foreclosed.

as to special settlement offers being made by I.R.S. District Counsel to Goulding's clients, conditioned upon firing Goulding as their lawyer. (R. 251, pars. 38-39, pp. 12-13)

The Petition alleged that the government's withholding and concealment of the foregoing information, including Ex. G, led to the 7th Circuit's erroneous conclusion that the evidence of government misconduct was insufficient, and that the agents were merely fulfilling their duties. 26 F.3d at 662. Goulding averred that there is now sufficient evidence demonstrating that Dietz and Feinglass were instrumental in referring the matter for criminal investigation. Without the referral, there would have been no

criminal investigation and no sting operation; and thus, no prosecution. (R. 251, par. 41, p. 14) Goulding further asserted that the government does not deny that the criminal investigation was instituted proximate with the filing of Goulding's civil rights suit, nor does it deny involvement by Dietz and Feinglass in the referral. The government admits that Special Agent Hejza interviewed Dietz and Feinglass before accepting the referral. (R. 251, par. 41, p. 14) Hence, the government admits the *sine qua non* of the activities of Agent Dietz and Feinglass in instigating the prosecution.

REASONS FOR GRANTING CERTIORARI

I. Where the Petition under 28 U.S.C. § 2255 alleged Goulding was convicted in violation of his constitutional rights to effective

assistance of counsel and to due process of law (including denial of right to testify), and he submitted Affidavits in addition to his own averments in support of his allegations, and the government did not file contradictory affidavits, the District Court erred in denying the Petition without evidentiary hearing.

The District Judge in denying the § 2255 petition, said that "petitioner had . . . convicted himself" "on the tapes." (App. 28) And in affirming this decision (App. 15-16), and in affirming on direct appeal, 26 F.3d at 663-646, 667, the 7th Circuit said that the evidence of defendant's guilt was "overwhelming." But, had Goulding testified, he would have explained how the undisputed conduct was done innocently, in good faith and without any intent to break the law.

Affirmance of denial of § 2255 relief without evidentiary hearing, is

contrary to this Court's holdings - Machibroda v. United States, 368 U.S. 487, 479, 494-96 (1962), and Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). **The imperative of judicial integrity** demands that defendant's Petition be given a full hearing.[11]

Goulding was deprived of a fair trial when he was foreclosed, by his trial counsel's ineffective assistance, from presenting his own testimony to the jury - which would have explained how everything he did, he did in good faith and with no intent to defraud or otherwise to violate any law. Thus,

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[11] Note that "The National Association of Criminal Defense Lawyers and the Illinois Attorneys for Criminal Justice filed [*amicus*] briefs supporting a probe of the government's motives in indicting the defendants . . . ." Goulding, supra, 26 F.2d at 662 n.3.

defendant was deprived of his constitutional (due process) right to testify, Jones v. Barnes, 463 U.S. 745, 751 (1983); United States v. Butts, 630 F.Supp. 1145 (D. Me. 1986), and to present a defense. Crane v. Kentucky, 476 U.S. 683, 690 (1986).

Defendant's attorney's unilateral decision not to permit him to take the stand, eliminated defendant's best possible chance at acquittal via testimony denying criminal intent.

While there was overwhelming evidence of the **acts** alleged, this is not true as to defendant's **mental state**. His testimony could have shown that the acts were committed innocently, with no criminal intent.

The sting operation did not elicit

any *malum in se* conduct; it did not involve any clearly illicit activity. The UCA created an attorney-client relationship and established a legitimate need and a specific desire for secrecy (a past crime and an ex-wife); thus Goulding was legally and ethically obligated to provide the services and to form the corporations in a manner which would not divulge the UCA's confidences. Illinois Rule of Professional Conduct 1.6(a) (1990).[12]

The sting operation did not proposition Goulding to do anything illegal. Nor did the UCA demonstrate any intent to commit a future crime; his

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[12] The ABA Committee Comments clarify that this Rule obligates an attorney to take reasonable steps to assert and to uphold the client's confidentiality.

crime was complete.[13] The UCA specifically and repeatedly expressed his desire to use his cash accumulation "for investments", including the purchase of "a bowling alley, bar restaurant" and "apartments."[14] Goulding and Ushijima expressly determined that **incorporation was**

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[13] The UCA's suggestions for future crimes were immediately rebuffed by Goulding and Ushijima. (5/19/87 p. 34) (References to date and page, are to transcripts of tapes in evidence).

[14] 12/18/86 pp. 11-14; 2/6/87 pp. 48, 49; 2/24/87 pp. 20, 27-29, 31, 49, 50, 58, 66; 5/19/87 p. 42. This flatly contradicts a basic tenet of the 7th Circuit's opinion (and the government's false contrary assertions during closing argument) - that the corporations "had no purpose except to 'clean' [the undercover agent]'s money." 26 F.3d at 664. The overwhelming and uncontradicted evidence is to the contrary - a legitimate business purpose **did** exist which was created by the government's own scenario.

necessary to protect the UCA from personal liability.[15] The UCA led

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[15] Ushijima told Goulding, 2/24/87 pp. 28, 29:

> "A business operation like a bowling alley and, and/or a restaurant have a lot of liabilities connected. You want to isolate that in a company...you don't want that real estate subjected to a guy slipping in a bowling alley or eating bad food.... [To] own and operate a bowling alley/restaurant, wouldn't you incorporate [them] separately? And lease the real estate...to the operations?... You have two separate corporations [Goulding agreeing] maybe three.... That's only *good business practice.*" (Emphasis added.)

At 2/24/87 p. 50, Goulding told the UCA:

> "[The business could be] owned by the Cayman corporat[ion which] is actually going to then expend the funds, be it either as a loan to you or a direct acquisition of the property.... My suggestion would be a direct

Goulding to believe the corporations were legal.[16]

The purported waiver of right to testify is not binding on defendant when he now avers that his not testifying was induced by counsel's misrepresentations to him. The validity of this purported waiver cannot be conclusively presumed from the Record, in the face of defendant's averments in the Petition.

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acquisition."

[16] Goulding and Ushijima took offense at the UCA's suggestions that the corporations were "phony". (2/24/87 p. 49) Ushijima at 2/24/87 p. 11: "creating these...instruments or entities [in Grand Cayman] is...perfectly legal and above the table." The bank accounts were needed for such business as well. The promissory notes properly documented the loans, and had a repayment obligation which was discussed (2/6/87 pp. 46, 48, 49; 2/24/87 pp. 20, 27). All were necessary and legitimate.

A hearing is required.

It is no answer to say that the evidence at trial sufficiently supported the findings of defendant's guilt, which were reached absent Goulding's non-presented, exonerative testimony.[17]

For the District Court to have determined that Goulding would not have been a credible witness (App. 27-28)

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[17] On Oct. 29, 1996, the Review Board of the Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois recommended that Goulding be suspended from the practice of law for 4 years from June 24, 1994 (when he was summarily suspended). (In the Matter of Randall S. Goulding, No. 1025619, Commission No. 91 CH 208). That body had the benefit of Goulding's explanations (as per the testimony he never gave at the federal trial); and hearing those explanations, determined that despite his federal conviction of mail fraud, Goulding should again be permitted to practice law. A jury, hearing those explanations, could well have found Goulding lacked the *mens rea* for conviction.

based only on the Court's observations of him during trial, at which trial he did not testify (R. 259, p. 4), is irrational and improper. Like the other conclusions reached only from the pleadings in this case, it is contrary to this Court's holdings in Machibroda and Anderson, supra; accord, Castillo v. United States, 34 F.3d 443 (7 Cir. 1994) (2255 petition cannot be dismissed on pleadings where credibility issues are presented by affidavits). Had Goulding testified, he would have been able to establish his good faith, lack of knowledge of the relevant reporting requirements, and lack of predisposition, so as to support a complete defense of good faith.

Brady violation with respect to Defense Motion to Dismiss on grounds of

Invidious, Retaliatory Prosecution: That newly discovered evidence, not duly turned over to the defense and/or to the court, demonstrated that relevant materials substantiating defendant's pre-trial claim of invidious, retaliatory prosecution had not been turned over before trial.

The District Court's original finding, *aff'd*, 26 F.3d at 662, that there was insufficient evidence of improper government misconduct in the institution of the prosecution, is not determinative; for those decisions were made **without benefit of the new evidence**, which strongly demonstrated *animus* against Goulding on the part of [at least] Agent Feinglass, and also, evidence that Feinglass lied when he denied having previously interfered with Goulding's client relationships. (See pp. 14-19, supra.)

Accordingly, an evidentiary hearing

should be held on Goulding's allegations of constitutional deprivation which are substantially supported via affidavits, and not contradicted by the government in any relevant particular.

CONCLUSION

Certiorari should be allowed; and, on the merits, the judgment should be reversed and the cause remanded with appropriate directions to hold an evidentiary hearing.

Respectfully submitted,

RANDALL S. GOULDING,
Petitioner, *pro se*

APPENDICES

APPENDIX A - App. 1

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

(Argued March 29, 1996)

Decided August 2, 1996

Before

Hon. FRANK H. EASTERBROOK, *Circuit Judge*
Hon. ILANA DIAMOND ROVNER, *Circuit Judge*
Hon. DIANE P. WOOD, *Circuit Judge*

RANDALL S. GOULDING,	]	
	]	
Petitioner-Appellant,	]	
	]	
vs.	]	No. 95-1368
	]	
UNITED STATES OF AMERICA,	]	
	]	
Respondent-Appellee.	]	

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division,
James B. Moran, *Judge*, No. 93 C 2637

ORDER

Randall Goulding was charged in 1991 in an 18-count indictment with conspiracy to defraud the United States, mail fraud, and illegal transportation

of currency and monetary instruments, in violation of 18 U.S.C. §§ 371 and 1341, and 31 U.S.C. §§ 5316(a) and 5322(a). After a jury found him guilty, on all counts. Goulding was sentenced on October 15, 1992 to six months' incarceration on Count 1 and five years' probation on Counts 2 through 18. He was also sentenced to make *[p. 2]* restitution of $8,000 to the United States and to perform 500 hours of community service.

This court decided Goulding's direct appeal on March 25, 1994. See *United States v. Goulding,* 26 F.3d 656 (7th Cir. 1994). It held, in pertinent part, that (1) Goulding failed to demonstrate that the government had acted selectively or vindictively in

prosecuting him, (2) the district court correctly held that Federal Rule of Criminal Procedure 16(a)(2) precluded the production of the IRS's criminal referral documents, and thus that the court did not err in denying Goulding's discovery request for the production of those documents, and (3) Goulding waived his objection to the failure of the district court to give a particular instruction to the jury both because he failed to object below and because the instruction in question was not supported by the evidence.

On September 14, 1994, Goulding filed a motion to vacate his sentence pursuant to 28 U.S.C. § 2255. His petition asserted five basic grounds for relief: ineffective assistance of

counsel, deprivation of his constitutional right to testify, improper denial of access to criminal investigation reports, lack of evidence for Counts 17 and 18 that he had the requisite knowledge to support a conviction, and the invalidity of the conviction because the prosecution was vindictive. Without holding an evidential hearing, the district court denied the petition in an order dated December 5, 1995. It held that there was no basis for a conclusion that the prosecution was vindictive, that the government did not impermissibly limit discovery by refusing to provide Goulding with a copy of the criminal referral, and that Goulding was not denied effective assistance of counsel

(either because of a failure to object to a jury instruction or because of a failure to recommend that Goulding testify). *[p. 3]*

On appeal to this court, Goulding raises a host of issues, some of which relate to the merits of his § 2255 petition and others of which relate to the district court's refusal to hold an evidentiary hearing. Some of these issues, as we note below, were resolved against Goulding in his direct appeal to this court, and may therefore not be re-litigated in the guise of a motion under § 2255 absent a showing of good cause for and prejudice from his failure to appeal. *Melvin v. United States,* 78 F.3d 327, 329 (7th Cir. 1996); *Patel v. United States,* 19 F.3d 1231, 1237 (7th

Cir. 1994). In broad terms, Goulding claims that he has new evidence of vindictive prosecution, which shows that his constitutional right to due process has been violated both by outrageous government misconduct and violations of *Brady v. Maryland*, 373 U.S. 83 (1963). Second, he reiterates his claim that he was denied effective assistance of *counsel in* a variety *of respects,* principally by *counsel's improper* "refusal" to allow him to testify and by counsel's decisions on jury instructions. Finally, he claims that he should have been granted an evidentiary hearing, because disputed issues of fact existed on his allegations. We consider these points in turn.

This court considered Goulding's claim of "invidious, retaliatory prosecution" in the direct appeal from his conviction and rejected it. It is true that the Fifth Amendment prohibits the government from prosecuting a defendant because of some specific animus or ill will on the prosecutor's part or to punish the defendant for exercising a legally protected statutory, or constitutional right. See *United States v. Goodwin*, 457 U.S. 368, 372 (1992). Nevertheless, in *Goulding*, we held that Goulding failed to demonstrate that the government acted selectively or vindictively in its actions. In order to prevail on a claim of selective prosecution, he would have had to show that the Internal Revenue

Service's criminal investigation of him had both a discriminatory *[p. 4]* purpose and a discriminatory effect. 26 F.3d at 662. In order to show vindictive prosecution, he would have had to show that he was prosecuted to punish him for exercising a protected right. Id. This court carefully considered and rejected both claims, writing:

> even if Goulding could convince this Court that Agents Dietz and Feinglas harbored ill will towards Goulding, Goulding failed to demonstrate that these agents had any influence on the bringing of this prosecution. In fact, it is clear the agents were not involved in the decisions to begin a criminal prosecution or to

> prosecute--Goulding, however, makes no claim that the prosecutors who actually made the decision to bring charges against him acted vindictively. Furthermore, Goulding made no showing of discriminatory effect (he failed to show, for example, that other similarly situated persons were not prosecuted). Id.

The alleged "new evidence" of vindictiveness that Goulding has brought forward in his § 2255 petition suffers from the same flaw: it does not demonstrate any link between the alleged ill will and vindictiveness of the IRS agents in charge of the criminal tax investigation against Goulding and the prosecutors who initiated and litigated

the fraud, currency, and monetary instrument claims here. We reject Goulding's suggestion that we should adopt a theory of "imputed vindictiveness," pursuant to which the U.S. attorneys should be held responsible for the state of mind of the IRS agents. This is not a case where an investigator working for the U.S. Attorney's office knows of crucial exculpatory information and fails to turn it over, where courts have held that the prosecutor must be held responsible for the acts of its agent. See *Kyles v. Whitley*, 115 S.Ct. 1555, 1567-1568 (1995); *United States v. Morris*, 80 F.3d 1151, 1169 (7th Cir. 1996). There is nothing to indicate *[p. 5]* that the IRS was acting as an

agent of the prosecutors in an unrelated case. and thus we cannot impute its motivations to the prosecuting authority. As for his allegation of outrageous Government conduct, it is enough to note that this court rejected that theory as an independent ground of recovery in *United States v. Boyd*, 55 F.3d 239 (7th Cir. 1995). In any event, the "new evidence" is at best cumulative to that already considered by this court. We decline to give Goulding a second bite at the apple on this claim.

Goulding's claim that he was denied effective assistance of counsel by his lawyer's alleged "refusal" to allow him to testify is similarly unpersuasive. Goulding, himself a lawyer, attempts to portray himself as a susceptible

individual whose will was somehow overborne by his attorney. He states in his brief that he was not "permitted to testify," and that his attorney made a "unilateral decision not to permit [him] to take the stand." Putting the rhetoric to one side, however, the trial record before Judge Moran speaks for itself:

Judge Moran:	Mr. Goulding, you understand that you have a right to testify, or not testify.
Goulding:	Absolutely. Your Honor.
Judge Moran:	And you can get all sorts of advice from your counsel as to whether you should or you shouldn't.
Goulding:	And I certainly have.
Judge Moran:	But the final decision is up to

you.

Goulding: I understand.

Judge Moran: And it is your choice not to testify.

[p. 6]

Goulding: I understand.

Judge Moran: And that is your choice.

Goulding: That is my choice, correct.

Judge Moran: Okay.

Goulding offers no evidence to show that he was somehow incapable of responding honestly and knowledgeably to the judge's questions. The general rule is that parties are held to their responses, both in these kinds of exchanges and in Rule 11 colloquies. even if then, later have second thoughts. See *United States v. Messino*, 55 F.3d 1241, 1248 (7th Cir. 1995);

United States v. Malave, 22 F.3d 145, 148 (7th Cir. 1994); *United States v. Cirrincione*, 780 F.2d 620, 624 (7th Cir. 1996) ("A truly knowing and intelligent waiver accepted by the court will insulate a conviction from later attack.")

Goulding's other assertions of ineffective assistance of counsel are equally unavailing. In order to prevail on this kind of claim, he must present evidence that his counsel's conduct fell below an objective standard of reasonableness and that his case was prejudiced by his counsel's conduct. *Strickland v. Washington*, 466 U.S. 668 (1984). Here, in addition to the claim about counsel's advice on his right to testify, Goulding asserts that his

counsel did not perform a thorough enough investigation, that he failed to submit proper "theory of the defense" jury instructions (in the face of this court's earlier holding that the evidence in the record did not support the instruction Goulding is still claiming should have been given, see 26 F.3d at 668), and that counsel failed to pay attention at a critical point in the trial, when certain incriminating tapes were being played. Even if we assumed for the sake of argument that the lawyer's decisions were unreasonable (and we see nothing to support such an assumption), Goulding's argument fails on the "prejudice" part of the test. As *[p. 7]* the panel on direct review has already observed, the evidence against

Goulding "was overwhelming." Id. at 663-64. He therefore has not raised a credible ineffective assistance of counsel claim.

In light of the nature of Goulding's claims in the § 2255 petition, the district court did not abuse its discretion in deciding not to hold an evidentiary hearing. A hearing is not required if "the motion and the files and records of the case conclusively show that the prisoner is not entitled to relief." 28 U.S.C. § 2255, ¶3. We agree with Judge Moran that this standard was met. We therefore **AFFIRM** the judgment of the district court.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

[dated August 19, 1996]

Before
Hon. FRANK H. EASTERBROOK, *Circuit Judge*
Hon. ILANA DIAMOND ROVNER, *Circuit Judge*
Hon. DIANE P. WOOD, *Circuit Judge*

RANDALL S. GOULDING,	]	
	]	
Petitioner-Appellant,	]	
	]	
vs.	]	No. 95-1368
	]	
UNITED STATES OF AMERICA,	]	
	]	
Respondent-Appellee.	]	

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division, **James B. Moran**, *Judge*, No. 93 C 2637

ORDER

On consideration of the petition for rehearing with suggestion for rehearing *en banc* filed by *pro se* petitioner-appellant Randall Goulding in the above-entitled cause on August 14,

1996, no judge in regular active service has requested a vote on the suggestion for rehearing *en banc,* and all members of the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, **DENIED.**

Minute Order Form (rev. 12/90)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[dated December 8, 1994]

UNITED STATES OF AMERICA,	)	
v.	)	No. 93 C 2637 No. 91 CR 370-1
RANDALL S. GOULDING, Defendant	)	Judge Moran

Memorandum and Order

DOCKET ENTRY:

Enter Memorandum and Order. Defendant, by a Section 2255 petition, seeks to raise constitutional issues attacking the validity of his conviction. While the reasons advanced are many, they are mostly prior arguments in new packages. The petition is denied.

DEC 8 1994

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	[dated Dec. 5, 1994]
	)	
v.	)	No. 93 C 2637
	)	No. 91 CR 370-1
RANDALL S. GOULDING, Defendant	)	Judge Moran

MEMORANDUM AND ORDER

Defendant, by a §2255 petition, seeks to raise constitutional issues attacking the validity of his conviction. While the reasons advanced are many, they are mostly prior arguments in new packages. The petition is denied.

The petition alleges that defendant was denied effective assistance of counsel, denied his constitutional right to testify, was improperly denied access

to criminal investigation reports, was convicted of counts 17 and 18 despite an absence of evidence that he had the requisite knowledge for conviction, and that additional evidence shows that the prosecution was vindictive. We consider that petition from the perspective of having been the trial judge, of having reviewed the arguments and exhibits of the petitioner and the government, including petitioner's 45-page handwritten reply brief, and being mindful that the Court of Appeals considered and decided numerous issues on appeal. We are also well aware that, as petitioner concedes, in this case "[v]irtually everything is on tape."

We deal with the last issue first. Petitioner contended both in the trial

court and the Court of Appeals that the prosecution was vindictive because the conduct of two IRS agents back in the *[p. 2]* mid-1980s was vindictive and the government would not give him a copy of the criminal referral. Neither this court nor the Court of Appeals found the argument persuasive and, besides, the Court of Appeals specifically ruled that the production was precluded by Fed.R.Cr.P. 16(a) (2). United States v. Goulding, 26 F.3d 656, 662 (7th Cir. 1993). Petitioner now adds in a hearsay opinion of a former IRS agent, whom he solicited to be (and who could have been, if he had had anything relevant to say) a retained expert, who opined that referral reports are not normally withheld and might be Brady material.

He also adds some additional material indicating that one of the IRS agents may have acted improperly in the mid-1980s. Petitioner does not, however, establish any connection between that agent and this prosecution, as pointed out by the Court of Appeals; the government had no obligation to furnish the report unless it was Brady material; and we do not assume that government attorneys disregarded their obligations to furnish Brady material solely because of their resistance to production of the report.

Petitioner also contends that he was denied effective assistance of counsel. Establishing that is a daunting task -- the counsel was of his choosing; that counsel is recognized as

one of the most competent criminal defense lawyers in the community; the standard of proof petitioner must meet is high; this court observed that representation throughout the trial; and, given the tapes, petitioner did not give his counsel much to work with. Nevertheless, we will consider petitioner's principal contentions. He argues that his counsel should have objected to this court's *[p. 3]* failure to give tendered instruction No. 20, while failing to note that the Court of Appeals has ruled that the instruction was not supported by the evidence in the record. Id. at 668. That court has also ruled that the instructions pertaining to reporting requirements were "entirely adequate." Id. at 666.

The government's closing argument was permissible. Id. at 667-668. Most of the remaining arguments are little more than nitpicking - counsel did not talk with petitioner as often as petitioner would have liked, he on occasion rejected petitioner's views as to trial tactics, he sometimes did not pursue some line of inquiry as vigorously as petitioner would have preferred.

The last significant bone of contention concerns the petitioner's failure to testify. Petitioner, an attorney (which undoubtedly explains the extent of his now second-guessing his counsel), was expressly advised that he had a right to testify or not testify and that the decision was his, and he expressly represented that he did not

wish to testify. He now claims that he should be relieved of that waiver because, although he wished to take the stand, he could not because his counsel was unprepared for his testimony. Although his counsel ascribes other reasons, we accept for the purposes of this petition the representation that counsel said he did not have time to prepare adequately to examine petitioner. What he also said, according to petitioner's affidavits, is that petitioner provided too much detail; that "if you ask him what time it is, he will tell you how to build a clock"; that he would not be a good witness; and that counsel could get in what he needed to get in through the co-defendant and *[p. 4]* argument.

This court has spent a considerable time on this case: pretrial, trial and post-trial. We have observed the petitioner in various circumstances, listened to him, and read whatever he has presented. This court has no question but that preparation of petitioner to testify would have required an incredible effort, and he still would have been a poor witness. As this petition demonstrates, he has his own perception of what is important and his own selective perception of the facts. We need look no further than the argument here that his representation was constitutionally ineffective because his counsel did not push positions that the Court of Appeals had previously ruled are unsupported by the evidence in

the record. Four judges (which includes this court) have concluded that proof of guilt was overwhelming. Petitioner has yet to concede he did anything wrong. One with that capacity for rationalizing would be a loose cannon on the witness stand, and an inviting target. We have no reason to disagree with counsel's conclusion, much less to term it ineffective assistance. Counsel did the best he could, but he could not surmount the difficulty that petitioner had, on the tapes, convicted himself.

JAMES B. MORAN,
Chief Judge,
U.S. District Court

Dec. 5, 1994